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No. 09-404

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

YMCA OF METROPOLITAN CHICAGO
AND TERRELL C. SANDERSON,

Petitioners,

v.

U.S. BANK, AS TRUSTEE OF
THE ROE ANN LOCKHART OBRA '93 TRUST, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

BRIEF IN OPPOSITION

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Question Presented

Whether this Court should grant review of a civil defendant's belatedly constructed federal due process attack on a state trial judge's grant of a new trial where:

(a) the federal due process issue was neither pressed in the state appellate court in the manner required by the court rules (it was raised only on rehearing) nor passed on by the court (which discussed only state-law authorities and did not mention due process);

(b) the federal due process issue formulated in the petition would be pertinent only if this Court first reached and resolved the antecedent issue of whether, under state law, a litigant has a "property" interest in a jury verdict which is subject to a pending motion for a new trial; and

(c) the federal due process issue is of only abstract interest in this particular case given the state appellate court's authoritative finding that state law afforded the civil litigant an ample opportunity to make an evidentiary record relating to its concerns, which it did not utilize (so that there was, in fact, no denial of due process on this record).

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BRIEF IN OPPOSITION

Jurisdiction

The YMCA has not met its burden to show that its federal due process argument was "specially set up or claimed" in the Illinois appellate court below as required by 28 U.S.C. §1257(a). In its opening brief on appeal below, the YMCA invoked only state-law authority. Accordingly, the Illinois appellate court did not consider federal due process (or any other aspect of federal law) in its decision. See pp. 5-11, *infra*.

Statement

The YMCA seeks review of a federal due process issue which it did not raise in its merits briefs in the Illinois appellate court below. The YMCA relies on 26 federal court decisions, *not one* of which it cited in its merits briefs, which cited only state-court cases construing state law. Federal due process was argued only on rehearing, and the court ignored the argument (appropriately, as under the Illinois rules it had been waived). This Court therefore lacks jurisdiction to hear the petition.

Even if jurisdiction somehow existed, the YMCA's petition is predicated on it being able to start with the "what process is due?" aspect of due process analysis. The decisions it cites involve civil or criminal defendants whose traditional interests in life, liberty, or property were allegedly threatened by procedural irregularities tainting the decision process of the ultimate factfinder. None involved a motion for a new trial decided by a judge not serving as the ultimate factfinder. This Court could not reach the issue pressed by the YMCA without first deciding an antecedent issue of whether Illinois law conveys on litigants any

"property" interest in a jury verdict which is subject to a pending motion for a new trial. Even if the YMCA's failure to preserve and present that issue could be excused, this state-law-focused issue is hardly a strong candidate for plenary review.

In any event, even if this Court were inclined to believe that it can and should review the federal due process issue identified by the YMCA, the Illinois appellate court made an authoritative finding under Illinois law (one not addressed in the petition) which resolves any due process concern. It held that state law afforded the YMCA an ample opportunity for an on-the-record evidentiary hearing into its concerns which it did not "make any effort" to pursue. Pet. App. at 16a.

A. Trial Court Proceedings

On January 8, 2001, Roe Ann Lockhart (age 12), while crossing a street in a Chicago suburb, was struck by a YMCA minivan driven by a YMCA employee. She was severely injured. Pet. App. at 2a, 6a-11a.

Respondent U.S. Bank is the trustee of Ms. Lockhart's interests. Although the YMCA's driver is included as a petitioner (despite having been dismissed as a party several years ago), for clarity we will reference petitioners as simply "YMCA." Likewise, we will reference respondents as simply "Lockhart."

Lockhart sued the YMCA for damages, and the matter went to trial in 2004. The trial resulted in a verdict for the YMCA, with Lockhart recovering nothing. Pet. App. at 2a, 31a.

Lockhart filed a motion for a new trial. Record, Vol. 17, at C4152-C4219. Her 68-page motion set forth numerous errors and irregularities in the trial which rendered it unfair as a whole. Six pages of her motion

(reproduced in the attached **Appendix A**) were devoted to explaining how Lockhart was denied a fair trial due to unfounded accusations made by one of the defense lawyers who, throughout the trial at sidebar conferences, in a loud voice which was meant to be, and was, overheard by the jurors, portrayed himself as the victim of wrongdoing and unfair treatment by both Lockhart's counsel and the trial judge. Lockhart App. at 11a-17a. In her brief, Lockhart asked the trial judge to rely on not just the transcript, but on what he had "personally witnessed," *id.* at 11a,[1] and emphasized how defense counsel's "'McEnroe/Knight' strategy of casting themselves as the victim of wrongdoing and unfair treatment" had "continued throughout . . . this trial," accompanied by "[v]ocal guffaws, histrionic eye rolls, and distracting body language . . . ." *Id.* at 17a.

Although the YMCA filed a detailed opposition to Lockhart's motion for a new trial, in which it set forth a rebuttal to nearly every section of her motion, it did not rebut the allegations set forth in these six pages. Record, Vol. 19, at C4666-C4700. Nor did the YMCA use time at oral argument to address the allegations in these six pages. Record, Vol. 29, at 242; Record, Vol. 30, at 6-17. The matter was submitted to the trial judge with these allegations unrebutted.

Skipping over the many other arguments Lockhart had made in favor of a new trial, in rendering its ruling the trial court focused on the allegations the YMCA

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[1] This request was appropriate under well-established Illinois law. *E.g.*, *Elizer v. Louisville & Nashville R. Co.*, 261 N.E.2d 827, 829-30 (Ill. App. 1970) (appellate courts defer to findings predicated on aspects of a trial not reflected in the transcript, because "[t]he attitude and demeanor of counsel and the general atmosphere of the trial are observed by the trial court, and cannot be reproduced in the record on appeal").

had left unrebutted. It granted Lockhart a new trial based on its finding "that repeated, deliberate outbursts by trial counsel for the defendants were heard by the jury and prejudiced [Lockhart], denying [her] a fair trial." Pet. App. at 2a; *see also id.* at 4a-6a, 32a-35a. "The trial court made a specific factual finding that the outbursts by defense counsel were not accidental but were 'purposefully made for the jury to hear.'" *Id.* at 5a. "The trial court added that defense counsel had been repeatedly admonished but counsel had 'ignored the Court in an effort to divert justice" — and "that defense counsel repeatedly came into the court's chambers at the end of a day's trial session and apologized to the trial court for his behavior, thus demonstrating that defense counsel knew that his behavior was wrong." *Id.*

As part of his ruling, the trial judge disclosed information he had relied on, in part, as confirming that the jury had overheard the remarks: a deputy sheriff (acting as bailiff) "reported on several occasions . . . that the jury was in disbelief from hearing these outbursts." Pet. App. at 34a; *see also id.* at 5a. During the court session in which the judge announced his ruling, the YMCA made no objection to the judge's reliance on these reports, nor to the judge's reliance on his own personal observations during the trial. *Id.* at 32a-35a. The YMCA did not seek reconsideration of the trial judge's ruling. (It sought only interlocutory appellate review, which was denied, Pet. at 4, a procedural aspect of the case which is no longer relevant because those efforts did not add anything to the record, and the YMCA does not seek review of the earlier appellate rulings.)

Neither at that court session nor in the months that followed before the second trial commenced did the YMCA seek to obtain the testimony of the bailiff or any

of the jurors, through an evidentiary hearing or otherwise. Pet. App. at 16a. Just as the YMCA had made no effort to rebut the allegations made by Lockhart in her motion for a new trial, the YMCA made no effort to rebut the findings of the trial judge announced from the bench.

At the second trial held in 2006, in which defense counsel's course of misconduct was not repeated, a new jury found in favor of Lockhart, awarding her approximately $15.5 million in damages for her injuries, past and future suffering, and past and future medical needs (after a 30% reduction for comparative negligence, and various setoffs). Pet. App. at 12a.

B. Appellate Court Proceedings

Following the entry of final judgment, the YMCA filed an appeal as of right in the Illinois intermediate appellate court. Of the 58 pages of text in its opening brief, the YMCA allocated fifteen pages to arguing that the verdict of the original jury in its favor should be reinstated because the trial court had erred in granting a new trial. YMCA App. Ct. Br. at 27-41. The YMCA cited thirteen decisions, all from state courts, and all interpreting state law. It cited none of the decisions cited in its current petition. (Pet. at 5 includes an out-of-context quotation from that brief; to ensure this Court has the needed context, the YMCA's full argument in its brief is reprinted as **Appendix B**.)

Citing only state-court decisions interpreting state law, the appellate court rejected the YMCA's claim that the trial judge had erred in granting the new trial. Pet. App. at 12a-17a. Regarding the YMCA's "complain[t] that the trial court launched no formal inquiry after being told by the deputy sheriff of the jurors' comments," the court observed that the YMCA had offered

"no support for its argument," *id.* at 14a; that "[t]he trial judge was obviously present" during the misconduct at issue, *id.*; that "based upon his own observations in conducting the trial, the trial judge made factual findings that defense counsel made these comments with the *deliberate intent* that the jury hear them, in an effort to 'divert justice,'" *id.* at 15a; and that "[t]he trial court also found that defense counsel knew his conduct was improper." *Id.* As to the trial judge's delay in disclosing what "his deputy sheriff informed him of the jurors' comments," the appellate court held that the delay did "not affect the trial court's decision making process," and further held that after the trial judge's ruling the YMCA had at least six months in which it "could have taken issue with the judge's findings and made a record regarding those points that [it] believed refuted the trial judge's opinion and ruling," during which it "fail[ed] to make any effort to provide a record contradicting the trial court's findings . . . ." *Id.* at 16a.

Following its loss in the intermediate appellate court, the YMCA filed a petition for rehearing. Pet. at 6. (A copy of the relevant section is reprinted as **Appendix C**.) In it, for the first time the YMCA cited the federal Constitution and federal case law to advance the argument that its "rights to due process were violated by Judge Burke's decision . . . ." Pet. for Rehearing at 1 (Lockhart App. at 39a) (citing U.S. Const. Amend. XIV, § 1; *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)). However, the Illinois appellate courts follow a strict rule that no new arguments will be considered at the rehearing stage. Illinois S. Ct. Rule 341(h)(7) ("Points not argued [in the opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). The court denied rehearing without comment. Pet.

App. at 26a-27a. The YMCA's efforts to obtain discretionary review in the Illinois Supreme Court were unsuccessful. Pet App. at 28a-30a.

Reasons for Denying the Petition

A. This Court Lacks Jurisdiction Over the Petition Because the Federal Due Process Issue Was Neither Pressed in the Manner Required by the Illinois Appellate Court's Rules Nor Passed on by the Court

Under the pertinent statutory language, this Court has jurisdiction to review the YMCA's federal due process claim only if the federal due process claim was "specially set up or claimed" in the Illinois intermediate appellate court (which in this case is "the highest court of a State in which a decision could be had," 28 U.S.C. § 1257(a); *e.g.*, *Clark v. Arizona*, 548 U.S. 735, 746-47 (2006)). The YMCA's claim will not be considered by this Court "unless it was either addressed by or properly presented to the state court that rendered the decision . . . ." *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

The YMCA's federal due process claim was not addressed in the decision of the Illinois appellate court. That decision merely addressed the "YMCA's claim that the trial court in the first trial erred" in granting a new trial. Pet. App. at 12a. It was bereft of any reference to federal due process, the federal Constitution, or any decisions interpreting federal law. The court merely reviewed the trial judge's order and the parties' conflicting arguments, "under an abuse of discretion standard," applying the ordinary standard of review. *Id.* It cited only Illinois decisions interpreting Illinois law. *Id.* at 12a-17a. It held that it could "find

no abuse of discretion by the trial court and thus no error in the granting" of the new trial. *Id.* at 17a.

Accordingly, the YMCA makes no suggestion in its petition that the Illinois appellate court actually decided a federal due process issue, that is, by analyzing legal principles or authorities bearing on federal due process. Rather, the best the YMCA can do is to note that the appellate court rejected the argument it made. Pet. at 5 (citing Pet. App. at 14a).

Everything, then, turns on this: *what argument did the YMCA make* in its briefing before the Illinois appellate court which that court found to be without support? Because the court "did not expressly address" the federal due process issue, this Court will "assume that the issue was not properly presented," so that the YMCA "bears the burden of defeating this assumption" by showing that properly raised the issue before the state court. *Adams*, 520 U.S. at 86-87. *E.g.*, *Street v. New York*, 394 U.S. 576, 582 (1969) (when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.").

A tell-tale sign of weakness in the YMCA's position is its reliance on the federal due process argument it sketched in seeking rehearing in the Illinois appellate court, filed *after* that court held there was no support for the YMCA's argument. Pet. at 6. However, the YMCA must show it presented a federal due process claim to the Illinois appellate court "at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981); *see also Adams*, 520 U.S. at 87; *Beck v. Washington*, 369 U.S. 541, 549-54 (1962). Under Illinois law, an appellant cannot preserve an argument on rehearing; all arguments must be made,

or else waived, in the opening brief. Illinois S. Ct. Rule 341(h)(7) ("Points not argued [in the opening brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). "[I]t is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of his court unless the court below in dealing with the petition considers and passes upon the Federal ground therein relied upon . . . ." *Bowe v. Scott*, 233 U.S. 658, 663 (1914).

In its petition for certiorari, the YMCA cites only one page of its opening brief in the Illinois appellate court. On that page is a short paragraph in which it summarized an Illinois appellate court decision holding in a criminal case "that a trial court's extrajudicial investigation deprives a party of its due process rights to a fair and open proceeding . . . ." YMCA App. Ct. Br. at 31 (Lockhart App. at 25a) (citing *People v. Rivers*, 102 N.E.2d 303 (Ill. 1951)) (cited in Pet. at 5). The YMCA relies on no other part of its opening brief.

The YMCA's passing reference to "due process" would hardly have put the Illinois appellate court on notice that it was advancing a *federal* due process argument. Its failure to cite any federal law authority meant, under the relevant rule, that no federal law argument was being made. *See* Illinois S. Ct. Rule 341(h)(7) ("Argument . . . shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities . . . relied on. . . . Points not argued are waived . . . .").

Nor did the passing reference to "due process" meet this Court's standards for preserving a federal due process issue. Where a particular state constitution has a due process clause (as is the case with Illinois, *see* Ill. Const., art. I, § 2), any references to "due process"

in briefing before the state courts will be deemed to invoke the state constitution only. *E.g.*, *Bowe*, 233 U.S. at 664-65. If a litigant wishes to invoke a federal constitutional provision, it must be listed. *New York Cent. & Hudson River R.R. Co. v. New York*, 186 U.S. 269, 273 (1902). This rule has been in place for a century. It hardly burdens a litigant advancing a due process claim to insist that it add the label "federal" if it wishes to invoke federal due process. *Howell v. Mississippi*, 543 U.S. 440, 443-44 (2005) (per curiam).

Beyond the background presumption that only a state constitution is being invoked where the word "federal" is omitted, it is affirmatively clear from an analysis of the authority cited by YMCA in its brief below that its reference to "due process" sounded in Illinois constitutional law alone. The *Rivers* case cited by the YMCA was a criminal prosecution in which the trial judge was alleged to have conducted a private investigation of the case, "depriving [the defendants] of their constitutional right to a fair and impartial trial and to be confronted by the witnesses against them." *People v. Rivers*, 102 N.E.2d 303, 306 (Ill. 1951). *Rivers* held that "[a]ny private investigation by the court . . . constitutes a denial to the defendant of the constitutional guarantee of due process of law," citing no federal authority, but only a state-court case. *Id.* That case, *People v. Cooper*, 75 N.E.2d 885 (Ill. 1947), in turn cited no federal authority and relied on only one constitutional provision: the confrontation clause of the Illinois Constitution. *Id.* at 887. Thus, even a "daisy chain" approach to seeing whether a federal issue was somehow presented in state-court briefing (through study of the cases cited in the cases cited by a litigant), *see Howell*, 543 U.S. at 443-44, reveals that the YMCA did not preserve a federal due process issue

for review. It did nothing to put the Illinois appellate court on notice of any federal-law argument.

Thus, this Court lacks jurisdiction over the issue presented in the petition.

B. The Federal Due Process Issue Could Only Be Reached If This Court First Decided an Issue Specific to Illinois Law Concerning Whether a Litigant Has a "Property" Interest in a Jury Verdict Which is Subject to a Pending Motion for a New Trial

Even if there were some basis for finding jurisdiction, the YMCA's petition is based on a flawed premise: that the only federal due process question to be decided is "what process is due?" That was the appropriate question put by the defendants in the cases on which the YMCA relies in its petition. In them, typically a defendant: (1) was before a factfinder whose decision might deprive the defendant of life,[2] a traditional liberty interest (e.g, through imprisonment,[3] or impair-

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[2] *Hopt v. Utah*, 110 U.S. 574, 577, 579 (1884) (murder defendant was sentenced to death by a jury which included two jurors challenged for actual bias, as to whom the voir dire had been conducted outside defendant's presence) (cited in Pet. at 11, 22).

[3] *In re Oliver*, 333 U.S. 257, 258-60, 265, 273 (1948) (witness before a "one-man grand jury" investigation conducted by judge was summarily jailed for 60 days, without the filing of charges, representation by counsel, or a hearing; judge ruled witness had lied, basing his finding of contempt on testimony from another witness who had earlier testified in secret) (cited in Pet. at 9); *Shields v. United States*, 273 U.S. 583, 584-86 (1927) (criminal defendant sentenced to year in jail after trial judge gave two supplemental charges in defendant's absence) (cited in Pet. at 15-17).

ment of child custody[4]), or a traditional property interest (e.g., through imposition of damages,[5] injury to real property,[6] or interference with employment[7] or business[8]); and (2) the factfinder's decisionmaking integrity was compromised through *ex parte* exposure to information concerning the case.

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[4] *Yost v. Johnson*, 591 A.2d 178, 179-82 (Del. 1991) (cited in Pet. at 23-24) (mother lost custody of her children through an order of a Delaware family court judge who predicated jurisdiction on an *ex parte* conversation with a Virginia family court judge); *Ex parte R.D.N.*, 918 So.2d 100, 104-05 (Ala. 2005) (family law judge rejected father's child custody petition based in part on *ex parte* communications with child's guardian ad litem) (cited in Pet. at 24).

[5] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 431-33, 459-62 (1978) (previously hung jury convicted defendants of price-fixing conspiracy after judge pressed for a verdict during *ex parte* conversation with jury foreman) (cited in Pet. at 26).

[6] *Southern Ry. Co. v. Virginia*, 290 U.S. 190, 193-95 (1933) (with no prior notice or hearing, a state agency ordered a railway company to eliminate a grade crossing at a particular location, and build an overpass) (cited in Pet. at 12, 20).

[7] *Greene v. McElroy*, 360 U.S. 474, 478-82, 485-86, 492-93 & n.22, 496, 508 (1959) (executive at defense contractor was fired and unable to work in industry after federal agency revoked his security clearance based on compilations of various witness interviews never made available to executive) (cited in Pet. at 8, 10, 13-14, 26); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 104-06 (1963) (bar applicant denied admission based on confidential reports, without a hearing) (cited in Pet. at 2, 13-14, 20).

[8] *Morgan v. United States*, 304 U.S. 1, 18, 22 (1938) (Secretary of Agriculture allegedly capped charges at stockyards based on *ex parte* discussions with government prosecutors, with no notice to affected persons of the claims presented) (cited in Pet. at 12-13).

For example, in *Remmer v. United States*, 347 U.S. 227 (1954), which the YMCA calls perhaps the "clearest" decision in its favor, Pet. at 15 (it is featured as the lead precedent, Pet. at i, 1), a criminal defendant was on trial for tax evasion. During the trial, the jury foreman had discussions with the judge and the FBI about an apparent attempt to bribe the foreman made by someone apparently allied with the defendant. The prosecutors were briefed but the defendant and his counsel were kept in the dark. The foreman remained on the jury, and the jury convicted the defendant. *Id.* at 228. After the verdict, defense counsel learned of the *ex parte* discussions and sought a new trial, which was denied. *Id.* at 228-29. This Court held that any *ex parte* communications "with a juror during a trial about the matter pending before the jury" in a criminal case are "presumptively prejudicial," *id.*, at 229, and held that a new trial was required if prejudice was confirmed. *Id.* at 230.

There is nothing about this case similar to the cases relied on in the petition. The ultimate factfinder in the first trial was the jury, not the judge. Despite the pages devoted by the petition to summarizing the rule against *ex parte* judge-jury communications during trial, Pet. at 14-18, there is no allegation that the judge in the first trial communicated anything *to* the jury on an *ex parte* basis and thus, unlike the cases relied on by the YMCA, no suggestion that the jury's decision was tainted (and, of course, the YMCA won before the first jury, so it could not have been injured by any taint). It was a one-way communication: the judge learned information about the jury having heard defense counsel's outbursts, via a deputy sheriff who had overheard jurors' remarks while serving as bailiff.

On what basis, then, could the YMCA try to assert that a federal due process analysis can be brought to

bear in this case? Inasmuch as the target of the YMCA's attack is the trial judge's decision not to permit the first jury's verdict to stand as a judgment, and his decision instead to order a new trial, the theory presumably would be that the moment the first jury returned its verdict, the YMCA obtained a "property" interest in that verdict, even though it was subject to a motion for a new trial — "property" of which it was deprived when the judge decided, based on all the information available to him (including comments about the jury made to him by his bailiff), that the interests of justice required a new trial.

The YMCA offers no federal authority specifically endorsing its theory that it has some sort of "property" interest in a jury verdict which is subject to a motion for a new trial (indeed, it cites no case in which a civil defendant raised any due process objection to the grant of a new trial). Instead, the YMCA extracts from the decisions it cites the concept that a litigant is entitled to due process regarding those court rulings which are "critical" or "substantial," or "dispositive," or which "alter the outcome" of trials.[9] The vagueness of its formulation illustrates the absence of any clear law on this subject, and its failure to lay out for this Court the rationale for review of the threshold "property" question which is antecedent to the "what process is due?" question focused on by the petition.

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[9] Pet. at 14 (suggesting that "dispositive rulings" and "all critical stages of a trial proceeding" are subject to federal due process scrutiny); Pet. at 22 (suggesting that rulings which "alter the outcome of a trial or otherwise affect a litigant's substantial rights" are subject to federal due process scrutiny); Pet. at 27 (suggesting that rulings which "affect substantial rights" are subject to federal due process scrutiny).

It seems unlikely that the answer to whether the YMCA had a "property" interest in the verdict of the first jury lies in an analysis of federal law, particularly given that this Court has been reluctant to constitutionalize the civil procedure rules followed by state courts, thereby leaving room for a variety of approaches. *E.g.*, *Hooker v. Los Angeles*, 188 U.S. 314, 318 (1903) ("The Fourteenth Amendment does not control the power of a State to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard."); *see generally* John Leubsdorf, *Constitutional Civil Procedure*, 63 Tex. L. Rev. 579, 580-87 (1984).

Generally speaking, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Here, the YMCA has not pointed to any provision of Illinois law which might lead litigants to understand or expect that they have any particular right to keep as a final judgment a jury verdict which is subject to a pending motion for a new trial. To the contrary, Illinois has long provided that a trial judge may order a new trial, based on a wide variety of considerations and has broad discretion to do so in the service of the ends of justice. *E.g.*, *Wozniak v. Segal*, 308 N.E.2d 611, 612 (Ill. 1974); *Freeman v. Chicago Transit Authority*, 210 N.E.2d 191, 193-94 (Ill. 1965); *City of Chicago v. Pridmore*, 147 N.E.2d 54, 57-58 (Ill. 1957); *Belfield v. Coop*, 134 N.E.2d 249, 259 (Ill. 1956).

The system applies evenhandedly; the YMCA does not suggest it is skewed to advance the interests of either defendants or plaintiffs as a class. All litigants are put on thereby put on notice that they *cannot* count

on keeping verdicts in their favor entered as judgments, and that all verdicts are subject to the discretionary authority of trial judges to grant new trials. This system has the salutary effect of discouraging lawyers from engaging in misconduct to obtain favorable jury verdicts, given that trial judges enjoy ample discretion to refuse to enter such verdicts. Even if there were room for doubting the wisdom of this approach and even if the YMCA's failure to preserve and present the threshold due process issue could be excused, this state-law-focused issue is hardly a strong candidate for plenary review — and without review of this logically antecedent issue, the federal due process issue on which the YMCA focuses cannot be reached.

C. The Federal Due Process Issue Is of No Practical Importance to This Case Given the State Appellate Court's Authoritative Ruling That the YMCA Did Not "Make Any Effort" to Utilize Its Ample Opportunity Under Illinois Law to Make an Evidentiary Record Relating to Its Concerns

Finally, even if this Court were inclined to believe that it can and should review the federal due process issue, the Illinois appellate court made an authoritative finding under Illinois law (one not addressed in the petition) which resolves any due process concern. It held that state law afforded the YMCA an ample opportunity for an on-the-record evidentiary hearing into its concerns which it did not "make any effort" to pursue. Pet. App. at 16a. *See also* p. 6, *supra*. Although the YMCA has not disputed the correctness of

the analysis of Illinois law on which this holding was based, there is clearly ample support for it.[10]

Based on the record of this case and the relevant provisions of Illinois civil procedure, the Illinois appellate court held that the YMCA had a full opportunity to make an evidentiary record relating to its concerns, which it did not utilize — so that there was, in fact, no denial of due process on this record. Under a decision of this Court cited by the YMCA, that finding based on state law is authoritative. *Louisville & Nashville Railroad Co. v. Schmidt*, 177 U.S. 230, 237 (1900) ("The conclusions of fact found by the court of last resort of Kentucky" regarding a company having acted as a *de facto* party "are not subject to reexamination by this court . . . [a]ccepting as we do the interpretation placed by the courts of last resort of Kentucky on the law of that State") (cited in Pet. at 11). There is thus no practical point to the YMCA's petition, which invokes *Remmer* and similar cases in an effort to obtain a hearing regarding the *ex parte* communications at issue, to put them on the record. The YMCA enjoyed

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[10] The YMCA had months to seek reconsideration of the trial court's grant of a new trial before the second trial commenced, during which period the trial court retained jurisdiction to modify its order (even while the YMCA pursued an interlocutory appeal). *E.g.*, *People v. Marker*, 908 N.E.2d 16, 22-28 (Ill. 2009); *Stephans v. Chicago Transit Authority*, 171 N.E.2d 229, 231 (Ill. App. 1960). Illinois law permits parties to collect and present, on post-trial motions, "juror testimony or affidavits which are offered as proof of improper extraneous influences on the jury." *People v. Hobley*, 696 N.E.2d 313, 339 (Ill. 1998). "The inquiry may extend to asking jurors whether they were exposed to extraneous information by others and, if so, what information was exchanged." *Barton v. Chicago and North Western Transp. Co.*, 757 N.E.2d 533, 553 (Ill. App. 2001). *See also Wolfe v. Menard, Inc.*, 846 N.E.2d 605, 614-18 (Ill. App. 2006).

the opportunity for a hearing, years ago, under Illinois law. There is no reason for this Court to devote its resources to this case to consider whether or not to invoke federal due process to furnish a litigant with an option which it has already once declined.

Conclusion

For all the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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October 31, 2009

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APPENDIX A

06/30/04

**IN THE
CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT
LAW DIVISION**

U.S. BANK, as Guardian and Representative of the Estate of ROE ANN LOCKHART, a disabled minor,	)	
Plaintiff,	)	
vs.	)	No. 01 L 4891
YMCA OF METROPOLITAN CHICAGO, a corporation, TERRELL C. SANDERSON, as a duly authorized agent, servant and employee of the YMCA OF METROPOLITAN CHICAGO, a Corporation.	)	
Defendants.	)	

PLAINTIFF'S POST-TRIAL MOTION

NOW COMES the Plaintiff, U.S. BANK, as Guardian and Representative of the Estate of ROE ANN LOCKHART, a disabled minor, by and through its attorneys, JOSEPH R. CURCIO, LTD., and in support of its post-trial motion states as follows:

INTRODUCTION

This lawsuit arises out of an automobile-pedestrian collision on January 8, 2001 whereby the minor plaintiff, Roe Ann Lockhart, was rendered quadriplegic and severely brain damaged as a result of being struck by a van operated by the defendant, Terrell C. Sanderson. On April 15, 2004, this matter was assigned for trial to the Honorable Dennis Burke, and on May 5, 2004, the jury concluded their deliberations and found in favor of Defendants and against Plaintiff. Based upon numerous grounds that will be discussed at length in the following motion, Plaintiff was denied a fair trial and now seeks this Honorable Court grant her request for a new trial. **[2]**

PREFATORY NOTE

What And How, Before A Look At Why.

Before beginning a discussion of why Plaintiff believes she[1] is entitled to post-trial relief, a discussion of precisely what Plaintiff wants and just how this Court should view that request is necessary. Despite the fact that post-trial motions are filed after, most jury verdicts, post-trial motion practice is generally misunderstood by the trial bar. Many attorneys fail to grasp the true purpose of the post-trial motion or do not recognize that the trial judge assumes a new and substantially different role once the post-trial process begins. This lack of understanding can result in a disservice to both this Court and subsequent reviewing courts if the parties address the motion or its response as nothing more than a formality. Therefore, although

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[1] This brief will employ feminine pronouns to refer to the minor Plaintiff, even though "the Plaintiff" is a financial institution.

Plaintiff is well aware of the breadth of this Court's knowledge of the law, she asks this Court's indulgence as she sets out *what* she seeks in this motion and *how* she believes this request should be considered before she turns to the much more detailed discussion of *why* such relief is warranted in this instance:

A. Relief Requested.

What Plaintiff seeks in her motion is simple — she asks this Court to set aside the jury verdict and order a new trial.

B. Standards for Review.

Although left within the jurisdiction of the trial court, the post-trial motion is not really part of a civil trial. The post- trial motion is in fact the first, and the *most important*, step in the process of appellate review. Indeed, one of the principal reasons for **[3]** *requiring* the filing of a post-trial motion after a jury trial is that such a motion will eliminate unnecessary appeals by allowing the trial judge to grant a new trial without requiring either the parties or the court system to engage in the lengthy and expensive process of presenting briefs and argument in the reviewing courts. See *Allott Plumbing v. Owens-Corning*, 112 Ill. App. 3d 136, 444 N.E.2d 1390 (3rd Dist. 1983).

Thus, the post-trial motion must set out issues in a specific and detailed fashion since the motion is intended to not only provide a court with the opportunity to reconsider rulings previously made — but to reconsider them in a significantly different light than they were viewed during the course of the trial, As the Supreme Court observed in *Brown v. Decatur Memorial Hospital*, 83 Ill.2d 344, 415 N.E.2d 337 (1980), post-trial motions must be specific and detailed as

such specificity "allows the decision maker who is most familiar with the events at trial, the trial judge, to review his decisions without the pressure of an ongoing trial and to grant a new trial if, on reconsideration, he concludes his earlier decision was incorrect." *Id.* at 349.

Further, when reviewing the results of a trial, the trial judge is placed in a position superior to the members of the reviewing court who may ultimately have to consider the same issues:

> The purpose of vesting the trial judge with power to grant a new trial is to permit him, before losing jurisdiction of the case, to correct errors that he or the jury might have made during the course of the trial. Courts of review have repeatedly stated that they will not disturb the decision of the trial court on a motion for new trial unless a clear abuse of discretion is affirmatively shown. The reason for this rule is that the trial court has had the opportunity *to consider the conduct of the trial as a whole, and therefore, is in a superior position to consider the effects of errors which occurred, the fairness of the trial to all parties, and whether substantial justice was accomplished.*

[4]

Magnani v. Trogi, 70 Ill. App. 2d 216, 220, 218 N.E.2d 21 (2nd Dist. 1966) (emphasis supplied).

Thus, post-trial review is not simply a "ritualistic" first step in the review process. Placing the trial judge in this superior position arid granting him such broad discretion was intended to have the "salutary effect of promoting both the accuracy of decision making and the elimination of unnecessary appeals," *Brown v.*

Decatur Memorial Hospital, 83 Ill.2d at 350, 415 N.E.2d 337. And, to achieve the goals of eliminating unnecessary appeals and ensuring that the jury's verdict does substantial justice to the parties, "[a] trial court is allowed greater latitude in granting a new trial than in denying one." *Torrez v. Raag*, 43 UI. App. 3d 779, 782, 357 N.E2d 632 (2nd Dist. 1976). *See also Kolakowski v. Voris*, 94 Ill. App. 3d 404, 409-410, 418 N.E.2d 1003 (1st Dist. 1981).

This emphasis on according the trial judge the broadest possible latitude in granting a new trial does not arise from purely philosophical grounds. It rests on very practical considerations. In passing on the motion for new trial, the trial judge has the benefit of having actually observed the participants, their manner of speaking, and the general circumstances which aid in the determination of their credibility and the weight properly accorded to their testimony. This vantage point is not shared by any reviewing court, which must consider the trial based on the cold words which appear in the transcript. Reviewing courts therefore generally defer to a trial judge's decision that substantial justice required setting aside all or part of a jury verdict and a new trial. *See Harrison v. Chicago Transit Authority*, 48 Ill. App. 3d 564, 363 N.E.2d 81(1st Dist. 1977) and *Magnani*, 70 Ill.App.2d at 220, 218 N.E.2d 21. **[5]**

Recognizing his superior position, and keeping in mind the goals of doing substantial justice and avoiding unnecessary appeals, the trial judge's decision to grant a new trial is not measured by the more stringent evidentiary standards applicable to motions for summary judgment or directed verdict or the entry of a judgment *non obstante veredicto* as part of a post-trial motion. Instead, the trial judge is permitted to

"weigh the evidence and set aside the verdict and order a new trial if the verdict is contrary to the manifest weight of the evidence." *Reuter v. Kocan*, 113 Ill. App. 3d 903, 908, 446 N.E.2d 882 (2nd Dist. 1983), citing *Mizowek v. DeFranco*, 64 Ill.2d 303, 310, 356 N.E.2d 32 (1976). Thus, the "evidentiary standard for granting a new trial is less conclusive than that for directing a verdict or entering judgment *n.o.v.*" *Id.*

Moreover, the above principles have particular application where, as in this case, the party's request for a new trial is based, in part, on improper conduct and argument presented by opposing counsel. "The effect of counsel's remarks in the setting in which they were made, could more accurately be appraised by the trial judge than the appellate court." *Panelle v. Chicago Transit Authority*, 31 Ill.2d 560, 562, 202 N.E.2d 484 (1964). As this principle was restated by the Appellate Court in two later decisions:

> Generally, the allowance or refusal of a motion for a new trial is within the discretion of the trial judge because in passing on the motion he has the benefit of his previous observation of the participants, their manner of speaking, and the circumstances aiding in the determination of credibility. This deference given a trial judge by courts of review *is no where more justified than when applied to a question of prejudicial conduct of counsel before a jury. The trial judge is in a much better position to determine the prejudicial effect of counsel's conduct [than a reviewing court].*

Harrison v. Chicago Transit Authority, 48 Ill. App. 3d 564, 566, 363 N.E.2d 81(1st Dist. 1977) (emphasis supplied).

[6]

> Further, we must emphasize the distinction between the trial court's discretion in granting a new trial and the appellate court's more limited power of review. It is true that both the trial court and the appellate court owe great deference to a jury's determination of contested factual issues. As stated in *Torrez v. Raag*, "jury determinations can be set aside only when the trial court is clearly satisfied that they were occasioned by passion or prejudice or were found to be wholly unwarranted from the manifest weight of the evidence." Consequently, when a post-trial motion for a new trial is made, on the grounds of trial error, the trial judge must determine from his own observation, whether the verdict was tainted by a passion or prejudice." The appellate court in reviewing a decision, must not reverse it absent a clear abuse of discretion, affirmatively shown. While there must be "some error" occurring in the record as the grounds for a new trial, the trial court is in a superior position to weigh the affect of such error on the jury. Therefore, in reviewing the record and the briefs of counsel, we must accord proper deference to the trial court's assessment of the errors.

Kolakowski v. Voris, 94 Ill. App. 3d 404, 409-410, 418 N.E.2d 1003 (1st Dist. 1981) (citations omitted).

In this case now before the Court, Plaintiff asks this court to set aside the jury's verdict and order a new trial. As will be established *infra*, "substantial justice was [not] accomplished" in this case. There

were numerous instances of prejudicial comments and attorney misconduct that were so continuous and egregious that Plaintiff was denied her right to a fair trial and the verdict of the jury is forever tainted by passion and prejudice. Furthermore, the jury's verdict in favor of Defendant and against Plaintiff was contrary to the manifest weight of the evidence and should be set aside by this Court.

In asking for a new trial on these bases, Plaintiff does not ask this Court to assume the constitutional prerogatives of the jury. Instead, Plaintiff respectfully submits that the continual misconduct by Defendants' attorney denied Plaintiff a fair trial and led to a resolution by this jury that was so "unreasonable, arbitrary and unsupported by the evidence" that a new trial is not only warranted in this instance, but is required. [7]

ARGUMENT

I. Plaintiff Was Denied A Fair Trial As A Result of Numerous Instances Of Prejudicial Comments And Misconduct By Attorneys For Defendants.

From the very outset of the trial, counsel for the Defendants embarked upon a course of misconduct designed to obfuscate the issues and prejudice the Plaintiff and her attorneys in the minds of the jurors. The deliberate misconduct continued unmitigated throughout the presentation of witnesses all the way through to the closing arguments. Unfortunately, the atmosphere created by the Defendants' attorneys' misconduct is not adequately reflected in the cold, written record, since court reporters have no language to record tonal inflections, decibel levels, body lan-

guage, facial grimaces and bullying mannerisms. Although the transcripts cannot capture each such instance, this Court was a witness to the attorneys' conduct in this trial — the specific acts as well as the cumulative effect. As such, this Court may take judicial notice of this conduct, which was a substantial factor in this miscarriage of justice.

Generally, improper argument or misconduct of counsel can be a sufficient basis to require a new trial. *Mykytiuk v. Stamm*, 196 Ill. App. 3d 928, 936, 554 N.E.2d 505 (1990). A case that is on point and instructive to the issues presented in this motion is *Rutledge v. St. Anne's Hospital*, 230 Ill. App. 3d 786, 595 N.E.2d 1165, 1168 (1st Dist. 1992). In *Rutledge*, the plaintiff appealed a verdict in favor of a defendant hospital on the basis of numerous instances of prejudicial and improper arguments and other misconduct by the attorney for the defendant. Among some of the defendant's transgressions were arguing the nonjoinder of potential parties, violating a pretrial motion *in limine*, implying that the plaintiff was hiding evidence by not calling a witness and distorting and misrepresenting facts in order to mislead the jury. The Appellate [8] Court reversed the verdict for the defendant and remanded the case for retrial based upon the misconduct of the attorney for the defendant. The court recognized that some of the transgressions, standing alone, would not serve to form the basis for a new trial, however, when looked at together each instance of misconduct contributed to a cumulative prejudice against plaintiff caused by defense counsel over the course of the trial." 230 Ill. App. 3d 786, 595 N.E.2d 1168, 1170. Specifically, the Court stated:

> [O]ur determination here is predicated on the weight of prejudice cumulatively applied by

> defense counsel's actions. We note that throughout the record, not only in the passages cited in this opinion, counsel's conduct, both in chambers and in front of the jury, too often goes beyond the margin of zealous advocacy to become acrimonious, overly contentious, and unswervingly determined to persuade the jury that plaintiff is attempting to conceal evidence without any evidentiary foundation.
>
> The fact that this inflammatory disposition survives to become apparent in the record only supports our finding that the jury's decision was prejudiced by her actions and that plaintiff was denied a fair trial.

Id. at 1171.

In this case, there were numerous instances of misconduct that went far "beyond the margin of zealous advocacy." "Acrimonious" and "overly contentious" are mild descriptions of the behavior and conduct displayed by Defendant's counsel throughout the two weeks this matter was on trial. For that reason, this motion is lengthy, as it attempts to address Plaintiff's grievances with direct quotations from the written transcript. Similar to *Rutledge*, some of the transgressions, when looked at individually, would not alone warrant a new trial; however, the cumulative effect of the foregoing misconduct and prejudicial comments was overwhelming and served to deny this disabled minor a fair trial.

[34]

E. Plaintiff Was Prejudiced By The Continuous Unfounded Accusations By Defendants' Counsel That He Was The Victim Of Wrongdoing And Unfair Treatment By Both Plaintiff's Counsel And This Court.

The tone of hostility and contempt displayed by Defendants' attorneys was not limited to the examinations of witnesses in the courtroom, but also extended to the interactions with Plaintiff's attorneys and this Court during sidebar conferences in the hallway just outside of the courtroom. On numerous occasions the Court had to request that Defendant's attorney lower his voice so that the jury would not hear his arguments. In particular, the words "improper" and "inappropriate" were always stated in a loud voice, as quickly as possible, before the door to the courtroom closed and before the court reporter had time to set up in the hallway to begin her transcription. On one particular occasion, the Court literally had to rush to the door to close it himself because Defendants' attorney could not contain his diatribe until the court reporter was in the hallway to record the proceedings. Obviously, given this deliberate tactic, all of the prejudicial comments and accusations leveled by Defendants' attorney were not recorded in the transcript, but this Honorable Court personally witnessed that behavior and was personally accused of wrongdoing on more than one occasion, and will likely not soon forget the charged atmosphere created by this misconduct.

A particularly memorable instance of this type of outrageous misconduct that is found in the written transcript includes a direct attack by Defendants' counsel on the integrity and fairness of this Court. During the testimony of Thomas Walsh, Defendants

economic expert, counsel for Defendants strategically requested a sidebar conference **[35]** in order to stop the flow of the cross-examination.[6] In the hallway outside the courtroom, Counsel then launched into a histrionic display of feigned indignation, loudly accusing the Court of unfair treatment:

> THE COURT: All Right.
>
> MR. MANNION: I would like to put on the record **things should go both ways**. Mr. Siegel did not answer one of my questions. Now this witness isn't even allowed to explain anything. He's cut off. The jury is told to strike it. You're yelling at this witness. This is preposterous.
>
> MR. CURCIO: As you are yelling here outside the courtroom.
>
> MR. MANNION: This is improper.
>
> THE COURT: Settle down right now. Keep your voices down....

(Tr., 4/29/04, 1:30 p.m., attached hereto as Exhibit F, at 56, emphasis supplied.) This heated interaction continued with counsel for Defendant loudly proclaiming "[T]here is apparently different rules for our witness versus the plaintiff's witness," (*id.* at 56), and I would think the same rules should apply to both witnesses." (*Id.*)

Offended by such an outrageous display of disrespect for the office of this Honorable Court, counsel for Plaintiff put on the record his distaste for the lack of

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[6] At this point in the examination, Defendants' expert had been challenged on representations made in his C.V. regarding his teaching credentials at Georgetown University which were not supported by that schools records or Staff Directory. Put simply, the objection and request for a sidebar was a ruse.

professionalism and decorum employed by Defendants' counsel. Incredibly, counsel for Defendant later denied the impropriety of these comments:

> MR. MANNION: If Siegel was allowed to run on and this witness can't get a word in edgewise, apparently it's okay for Mr. Curcio to cut off a witness and it's supported by you, but if we try to do that it's not, and I don't think it's right.
>
> MR. CURCIO: Your Honor, these comments are unprofessional and they are a direct attack on the office that you occupy. **[36]**
>
> MR. MANNION: No, they're not.
>
> MR. CURCIO: Yes, they are.
>
> THE COURT: They surely are.

(*Id.* at 57.)

There is no question that the foregoing comments by Defense counsel were indeed a direct attack on the office occupied by this Court. Unfounded allegations such as these have absolutely no place whatsoever in the trial of a lawsuit. The fact that counsel for the defendant can boldly proclaim otherwise is an indication that (a) he was so out of control that he was completely unaware of what he was saying, which is very unlikely, or (b) like John McEnroe or Bobby Knight, these outbursts and feigned accusations of mistreatment are a highly calculated tactic in this attorney's "advocacy," attempting to extort greater leeway with the Court as the trail progresses.[7]

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[7] It must be noted that lead Defense counsel is an Ohio attorney who was admitted *pro hac vice* to try this case after Defendant's pervious trial counsel, John Patton, unsuccessfully attempted to continue to the trial last minute, citing a conflict a Wisconsin trial and a personal vacation. The tact that this particular attorney

Unfortunately, throughout this trial, counsel's loud accusations of improper conduct were not limited to criticisms of the Court, but also included direct attacks on the professionalism and conduct of Plaintiffs attorneys and witnesses. According to Defense counsel's performance, everyone was out to get him and his client; therefore, he granted himself license to win at all costs, no matter what was said or who was accused. Sadly, the dark shadow cast by this paranoia, whether real or acted, reached far and wide, and ultimately served to prejudice Plaintiff's right to a fair trial.

A particularly egregious example of this behavior was found on the very first day of trial, during the cross-examination of an independent eyewitness, Mrs. Willie Ann **[37]** Hagler. Prior to trial, Mrs. Hagler had given statements to investigators for both Plaintiff and Defendants. On cross- examination, Mrs. Hagler admitted that when discussing the incident with Defendants investigator, she had described the girl's actions to him as a run. The purpose of counsel's question in this regard was to point out that the witness had chosen the descriptive word "run" and was not led to use that word by Defendants' investigator, a point that she readily conceded to counsel. Despite her truthful answer to this question, counsel still attempted to impeach her as if she had not conceded his point on the witness stand. Counsel further attempted to undermine her credibility by improperly announcing to the jury, in dramatic fashion, the existence of a tape

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need not concern himself with his professional reputation in this jurisdiction proved liberating for his style of trial advocacy. As is unfortunately the case with such admissions, the probability that this attorney would ever appear again before this Court again is extremely low.

which he intended on playing. (*See* Tr., 4/23/04, 1:30 p.m., Ex. E, at 139.)

Because there was no foundation for impeachment, or a need to refresh the recollection of the witness, Plaintiff's counsel objected to any use of the tape, Instead of seeking a ruling outside the presence of the jury, Defendants' attorney then attempted to announce to the jury the contents of the tape, and its relation to prior deposition testimony, under the guise of arguing his legal position to the Court regarding the objection, thereby forcing Plaintiff's counsel to quickly request a side bar in order to stop counsel's improper speech publicizing the details of non-admitted, disputed evidence.

As the court reporter was transferring her equipment from the courtroom to the hallway, and before the door to the courtroom was closed, Defendant's attorney began yelling at the top of his voice "**This is IMPROPER, IMPROPER!**" His uncontrolled diatribe continued as he proceeded down the hallway to the location chosen by the Court for sidebar conferences. Counsel's yelling at this point was so loud and disruptive that Plaintiff's attorney was unfortunately compelled to gesture and whisper to **[38]** Defendants' counsel to "shut up."[8] At that time, the court interceded and told counsel to calm down. Counsel's outburst occurred prior to the court reporter setting up her equipment and therefore is not included in the written transcript. However, the following exchange was transcribed and is representative of the pattern of disrespect, disdain and belittling behavior Defendant's

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[8] This was an admittedly poor choice of words but under the circumstances was the only effective means of communication with counsel while he was still in mid-tantrum.

counsel exhibited towards Plaintiff's attorneys and the Court:

> THE COURT: We are outside the presence of the jury. For what purpose do you want to play the tape?
>
> MR. MANNION: To show it was in no way any type of leading question that brought this out. He brings out in his direct examination, **absolutely improper** to do —
>
> THE COURT: Keep it down.
>
> MR. MANNION: Absolutely improper to do, trying to make it seem like the investigator led her. It was her words run. They got to these witnesses. **They tampered with the witnesses and I resent it.**

(Tr., 4/23/04, 1:30 p.m., Ex. E, at 140.) As stated earlier, the written transcript does not adequately convey the explosive and vitriolic manner in which counsel addressed the Court and Plaintiff's attorneys.

Later in this same exchange, Plaintiff's counsel was attempting to correctly point out to the Court that Mrs. Hagler had answered the question posed to her in such a manner that counsel's efforts at discrediting her were not impeaching, when counsel exploded with the following accusation: "The fact that you can coach witnesses and change their testimony." (*id.* at 142) Once again, the Court intervened in order to stop the personal attacks and histrionic responses of counsel for Defendant. After this outrageous display of disrespect and attempted intimidation, the sidebar concluded with **[39]** the Court reminding counsel for Defendant the roles of the Court and attorneys in a trial in his courtroom: that the Court decides what happens at trial, not Defendants' counsel. (*Id.*) The Court further

implored Defendants' counsel to not let the matter get out of hand and turn into a "circus."[9] (*Id.*)

Defendants' "McEnroe/Knight' strategy of casting themselves as the victim of wrongdoing and unfair treatment continued throughout the remainder of this trial. The multiple accusations of improper conduct leveled at Plaintiff's attorneys and the claims of unfair treatment leveled at the Court were clearly audible to the jury. On numerous occasions, the Court had to take the unusual remedy of relocating the jury to the jury room in order to rule on a simple evidentiary issue. Vocal guffaws, histrionic eye rolls, and distracting body language were common place throughout Plaintiff's attempts to conduct examinations of her witnesses. All of these improper actions were designed with one goal in mind: to prejudice Plaintiff and her attorneys in the minds of the jury and taint the proceedings and the outcome with passion and sympathy.

* * *

[67]

CONCLUSION

The foregoing examples amount to the trial equivalent of the proverbial frog in the pot slowly brought to boil. While some specific instances of counsel's misconduct were outrageous, each one in isolation did not rob the Plaintiff of her fair trial. However, taken as a whole the gradual and cumulative effect of the miscon-

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[9] Unfortunately, this request by the Court would be repeated throughout the trial. On more than one occasion, the Court warned Defendants' attorneys to not make him mad. As stated earlier, the Court's temperament and patience in handling these tactics was exceptional, however, it was ultimately exploited by Defendants' counsel in his efforts to continue pushing the envelope.

duct left this Court and the Plaintiff with a result as contrary to the concept of a fair trial as any single error worthy of an immediate mistrial. Although a trial should be the result of our adversarial system, the Plaintiff is entitled to have a jury hear the case free form fabricated evidence, false innuendo, and courtroom antics intent on prejudicing the jury against Plaintiff and her counsel. And though Plaintiff also cites errors in the court's instructions, by the time the jury was instructed, no information provided to the jurors could revive the dead frog in the pot.

According to the our *Appellate Court in Los Amigos Supermarket v. Metropolitan Bank and Trust Co.*, 306, Ill. App. 3d 115, 713 N.E.2d 686 (1st Dist. 1999), this Court must answer three questions: (1) Was this a close case for which the jury could have **[68]** decided either way? (2) Were there substantial errors in this case? and (3) Might have those errors tipped the scales in favor of the successful party? *Id.* at 129, 713 N.E.2d at 696. If those questions are answered in the affirmative. as they are in this case, the situation mandates a new trial. *Id.*

The specific misconduct in the examination tactics and closing argument in the *Los Amigos* case is uncannily similar to the present case:

> Although counsel is allowed to draw all reasonable inferences from the evidence during closing arguments, [he] is not permitted to misrepresent the evidence, argue facts not in evidence, or "create [his] own evidence." While [opposing counsel] did not object to counsel's comments during closing argument, waiver generally does not result where the comments were so inflammatory or prejudicial as to deny a party a fair trial.

> We cannot say that counsel's questions and closing argument did not affect the outcome of the case. This was a close case which turned for the most part on witness credibility. The unsupported innuendo by Avina's counsel could have tarnished Rodriquez's credibility. . . . We must reverse the trial court's judgment and remand for a new trial.

Id. (citations omitted). Likewise, for all of the reasons stated herein, Plaintiff respectfully requests this Court allow the minor Plaintiff, Roe Ann Lockhart, to have the fair trial to which she is entitled. Notwithstanding the efforts of this Court and her counsel to afford her one, she did not receive one before this recent jury.

Respectfully submitted,

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APPENDIX B

No. 07-487
In the
Appellate Court of Illinois
First Judicial District

U.S. BANK, as Trustee of the ROE ANN LOCKHART OBRA '93 TRUST, and the ROE ANN LOCKHART OBRA '93 TRUST, formerly U.S. Bank, as Guardian and Representative of the ESTATE OF ROE ANN LOCKHART, a disabled minor,

Plaintiff-Appellees,

v.

YMCA OF METROPOLITAN CHICAGO, a corporation, TERRELL C. SANDERSON, as a duly authorized agent, servant and employee of The YMCA OF METROPOLITAN CHICAGO, a corporation,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS YMCA OF METROPOLITAN CHICAGO AND TERRELL C. SANDERSON

[8]

ISSUES PRESENTED FOR REVIEW

Issue Re: The First Trial

1. Whether a trial court may keep secret multiple improper, unverified *exparte* communications between itself, its sheriff and the jury during trial, and then later — after a defense verdict and after a court-ordered post-verdict mediation fails to settle the case

for plaintiff — use those improper and unverifiable *ex parte* communications as the sole basis to impeach the jury verdict and to award plaintiff a new trial.

* * *

[27]

ARGUMENT RE: THE FIRST TRIAL

I. THE TRIAL COURT CANNOT IMPEACH THE VERDICT AND AWARD A NEW TRIAL BASED ON WHOLLY UNSUBSTANTIATED, ILLICIT, *EX PARTE* JURY COMMUNICATIONS.

A. Standard Of Review

When a trial court's exercise of its discretion — awarding a new trial — is based on an erroneous conclusion of law, appellate review is *de novo*. *Beehn v. Eppard*, 321 Ill. App. 3d 677, 747 N.E.2d 1010, 1013 (1st Dist. 2001); *Hall v. Chicago & N. W. Ry. Co.*, [28] 349 Ill. App. 175, 110 N.E.2d 654,658 (1st Dist. 1953). In *Hall* for example, the trial court granted plaintiff a new trial for one stated reason: defendant's closing argument that plaintiffs recovery was not subject to income tax. The appellate court held that whether the jury could be apprised that a recovery was not subject to income tax involved a question of law. Accordingly, the court was not confined by the abuse of discretion standard in reviewing whether the order granting a new trial was proper:

> [T]he trial judge was not called upon to exercise his discretion in determining whether the verdict was against the manifest weight of the evidence or determining the credibility of witnesses; his discretion was apparently exer-

> cised *in favor of defendant* on all matters raised in the motion for a new trial with the exception of the propriety of counsel's argument to the jury as to income tax. The crucial question presented in defendant's petition is whether the trial court erred *as a matter of law* in granting a new trial. The court had no discretion in deciding that question; the solution must be based on a consideration of the law rather than on the more general issue of the limits of judicial discretion. 110 N.E.2d at 658 (emphasis in original).

Hall's reasoning applies here. The trial court's discretion was apparently exercised *in favor of defendant* YMCA on all matters raised in the motions for a new trial with the exception of one that the court raised on its own: alleged prejudice supported solely by secret, ex parte juror communications. Like *Hall*, this appeal presents an issue of law to this Court: whether, as a matter of law, a trial court can award a new trial based on unverifiable prejudicial statements, allegedly uncovered during secret, *ex parte* [29] communications between the court staff and jury. The question raised is not whether the finding of prejudice is supported by the record — the trial court conceded that it was not — because the finding is supported only by secret, *ex parte* juror communications. Thus, there is no discretion to review, meaning that this Court is not constrained by the abuse of discretion standard of review. Instead, review is *de novo*.

Even if an abuse of discretion standard applies, that discretion was abused here. The trial court can not substitute its judgment for that of the jury by granting a new trial where the evidence supports the verdict and it does not appear the moving party was

denied a fair trial. *Lagoni v. Holiday Inn Midway*, 262 Ill. App. 3d 1020, 635 N.E.2d 622, 628 (1st Dist. 1994).

B. It Is Reversible Error To Grant A New Trial Based On A Secret, Extrajudicial Investigation That Deprives A Party Of Its Due Process Rights To A Fair And Open Proceeding.

It is reversible error to grant a new trial based on a court's secret, extrajudicial investigation. *People v. Rivers*, 410 Ill. 410, 102 N.E.2d 303 (1951); *Takecare v. Loeser*, 113 Ill. App. 2d 149, 251 N.E.2d 724 (1st Dist. 1969); *Loucks v. Pierce*, 341 Ill. App. 253, 93 N.E.2d 372 (4th Dist. 1950).

In *Loucks*, the jury returned a defense verdict. Plaintiff moved for a new trial based on claims of juror irregularities, including claims that the bailiff waited ten minutes before discharging the jury past the trial court's predetermined time to declare a mistrial so that the jury could reach a verdict; that the bailiff provided the jury with the definition of a word at the jury's request; and that a juror's verdict was the result of improper arguments by other jurors during deliberations. 93 N.E.2d at 374-76. The court ordered a new trial after undertaking a private investigation of the alleged irregularities by interrogating court personnel. *Id.* at 374. Evidence of the court's investigation did not **[30]** appear in the record. *Id.* It appeared that the court's decision was based, in part, on hearsay as opposed to credible facts. *Id.*

The appellate court reversed, holding that it is error to grant a new trial based on a judge's private, extrajudicial investigation:

> If the trial court based the allowance of the new trial upon his own extra-judicial investiga-

> tion, it must be held error. The rights of litigants in a court of record cannot be left to the mercy of private remarks in the judge's ear. 93 N.E.2d at 374.

The court reversed the new trial order because the right to appellate review is nullified if the order is based on secret evidence:

> The right [to discretionary review of a new trial order] would be nullified if the order is based on evidence heard outside of court, and not preserved in the report of proceedings. 93 N.E.2d at 374.

Loucks remanded the case for an evidentiary hearing so that the trial court could consider for the first time whether plaintiff was prejudiced by the alleged irregularities, the only relevant inquiry justifying a new trial. *Id.* at 376-77. The appellate court established the standard for determining prejudice: the trial court had to find that the verdict would have been different but for the irregularities. Id. at 376.

Loucks makes clear that a new trial cannot be awarded for irregularities not impacting the verdict. Where the verdict is just and supported by the evidence, no new trial is warranted. *Id.* Additionally, this finding of prejudice has to be based on credible facts, not hearsay. *Id.* at 377. **[31]**

In *Takecare*, the trial court changed a judgment after engaging in *ex parte* communications with several jurors after the verdict had been rendered and the jurors had been discharged. The court claimed the changed judgment reflected the "real intention of the jury." 251 N.E.2d at 725. The appellate court reinstated the verdict and remanded the case with directions to enter judgment on the verdict, stating:

> [T]he court entered judgment for defendant contrary to the verdict because of a conversation he had with jurors after the verdict had been rendered and after the jury had been discharged. This conversation resulting as it did in the entry of the judgment amounted to a private extrajudicial investigation and clearly was erroneous. *Id.* at 726.

Finally, in *Rivers*, the appellate court explained that a trial court's extrajudicial investigation deprives a party of its due process rights to a fair and open proceeding:

> However innocently any private investigation may have been made, for whatever purpose, and regardless of its results, the defendants' constitutional right to have everything considered against them produced in open court has been violated. 102 N.E.2d at 308.

Loucks, *Takecare* and *Rivers* are dispositive. Here, the trial court's order awarding plaintiff a new trial is based on hearsay obtained through the court's secret, extrajudicial investigation of matters entirely outside the record: jurors allegedly overhearing Mr. Mannion's sidebar comments. Such hearsay cannot be used to impeach the verdict. As *Loucks* noted, the court's order constitutes reversible error as a matter of law because it is unsubstantiated and essentially unreviewable. **[32]**

Like *Takecare*, defendants are entitled to entry of judgment in accordance with the verdict. And unlike *Loucks*, there is no reason to remand this case to consider whether there was a probability of a different result on retrial. The trial court has already made that determination, finding that it was not probable — or

even more likely than not — that the alleged misconduct affected the verdict. The court stated: "The outcome, the verdicts could have, might have been the same." (V. 30, Tr. 25)

The court's determination that the verdict would likely have been the same, regardless of Mr. Mannion's alleged "outbursts," is confirmed by the record. Roe Ann ran onto the highway outside the crosswalk and directly into the path of Sanderson's vehicle, which was traveling well below the posted speed limit. A defense verdict was mandated under the evidence, and was a foregone conclusion after the two eyewitnesses, Bolden-Blocker and Hagler, were impeached when they recanted and changed significant portions of their testimony under questioning by plaintiff's counsel. (V. 23, Tr. 41, 91, 106, 150; V. 24, Tr. 58-59, 72, 78-80, 101, 113, 115-116; V. 27, Tr. 241-42, 245-46; V. 30, Tr. 25)

Plainly, any prejudice to plaintiff was the result of Hagler's ultimate admission that Roe Ann entered the roadway in a "split second" in front of the van, and Hagler's candid revelation that she believed plaintiffs investigator had attempted to influence her observations because he kept going back to the fact that the girl had "almost died." (V. 24, Tr. 109-10, 112) Further, plaintiffs own expert witness conceded that Roe Ann's movement onto the road took 2/3 to 3/4 of a second, leaving a driver no time to react given that the standard reaction perception time is 1.5 to 2 seconds or even longer. (V. 27, Tr. 12-14) **[33]**

Simply stated, the defense verdict is just and the only verdict allowable under the evidence of this case. Thus, this case must be remanded with directions to reinstate the jury verdict for defendants.

C. The Court Cannot Unilaterally Amend The Record Months After Trial To Reflect Its Purported Memory Of Events.

A trial court cannot augment the record with its "clear memory" of facts that contradict the clear and unambiguous contents of the record. *Hartgraves v. Don Cartage Co.*, 63 Ill. 2d 425, 348 N.E.2d 457, 461 (1976). In *Hartgraves*, a juror was injured and could not continue with trial. There was an in-chambers, off-the-record discussion in which plaintiff contended that defendant had consented to proceed with fewer than twelve jurors. Thereafter, defendant moved for a mistrial in open court, as reflected in the trial transcript. The court denied the motion and the case proceeded with eleven jurors. 348 N.E.2d at 458.

After the jury found for plaintiff defendant filed a posttrial motion alleging denial of its constitutional right to a jury of twelve. At the hearing on the post--trial motion, six months after trial, the judge stated that he had a "clear recollection" of the in-chambers discussion and that defendant had waived its right to a jury of twelve. The court denied the post-trial motion and defendant appealed. *Id.*

The appellate court reversed and the Supreme Court affirmed that decision. The high court held that the judge's recollection of events was not part of the record:

> [A]ny corrections of or additions to the record which contradict the clear and unambiguous contents of the record must be supported by something other than the "clear memory" of the trial judge. *Id.* at 461.

[34]

The court also held that if defendant had actually agreed to waive its right to a jury of twelve, contrary to what the record clearly showed, then it was incumbent on the judge and plaintiffs counsel to insure that the record reflected this fact:

> Further, it is incumbent on the judge and opposing counsel to insure that the record reflects any off-the-record agreements by which [a party] contradicts [its] on-the-record position. *Id.*

The court noted that there were no documents or minutes confirming defendant's alleged waiver; that the judge had relied solely on his "clear memory" of events; and that the transcript clearly reflected that defendant had not waived its right to a jury of twelve. *Id.* at 459.

Hartgraves applies with equal force in this case. Here, the court attempted to shore up its ruling by augmenting the record with its recollection of events occurring months earlier, in precisely the manner *Hartgraves* prohibits. As in *Hartgraves*, the court's purported memory of juror complaints about defense counsel's conduct, unsubstantiated by any evidence, is not part of the record.

The court's contention that the transcript does not reflect these events because they purportedly occurred before the court reporter could transcribe them is of no moment. (A.4-5) If in fact the alleged events occurred, *Hartgraves* dictates that it was incumbent on the trial court to insure that they were reflected in the record. This, the court did not do, Thus, the court's recollection is not part of the record and does not support its ruling granting a new trial.

Also like *Hartgraves*, the court's asserted memory of off-the-record events directly contradicts its stated procedure of putting all juror issues in writing: "I usually put **[35]** everything in writing." (V. 29, Tr. 42) Indeed, the record reflects that the court always followed its stated procedure when confronted with juror communications, however minor. The court made a record when jurors communicated to the sheriff about disruptive observers, and when a juror communicated to the sheriff about a personal scheduling issue. (V. 24, Tr. 147-48, V. 29, Tr. 41-42)

If, during the first trial, as the trial court stated, matters came to its attention via *ex parte* juror communications about the jury allegedly overhearing comments, the trial court should have *voir dired* the jury in counsels' presence. On this issue, defendants cite no less an authority than Robert A. Clifford, plaintiffs counsel in the second trial. During the second trial, defendant objected and moved for a mistrial based on a claim that Roe Ann made an outburst during opening statements that was overheard by the jury. Mr. Clifford stated, "I want the jury *voir dired* about whether or not they heard anything." (V. 32, Tr. 174-75)

The court always made a point of going on the record to report, and then redress, any juror communications. The fact that the court did *not* follow its stated procedure of going on the record to redress any of the alleged "several occasions" when jurors purportedly communicated such an alleged significant claim that they were overhearing defense counsel's sidebar comments, and allowing the jury to be *voir dired* in counsels' presence about whether or not they heard anything, is most telling.

In sum, Hartgraves mandates reversal. The court's *ipse dixit* — that plaintiff was prejudiced merely because the court said so — with no identification of the allegedly prejudicial comments allegedly overheard by the jury is not evidence and cannot be used to impeach the verdict. **[36]**

D. Canon 3(A)(4) Of The Code Of Judicial Conduct Forbids A Court From "Considering Ex Parte Communications."

There is an additional reason the court's decision to order a new trial withers under scrutiny. Canon 3(A)(4) of the Code of Judicial Conduct forbids a judge to "permit" or "consider" *ex parte* communications:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communica-tions, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . . Code of Judicial Conduct, Canon 3(A)(4).

It is improper not only for a judge to permit ex parte communications, but to fail to disclose them. *In re Marriage of Wheatley*, 297 Ill. App. 3d 854, 697 N.E.2d 938, 941 (5th Dist. 1998) (holding that judge's receipt of *ex parte* communications and failure to disclose this fact until announcement of his ruling created the appearance of impropriety).

For these reasons, the court should not have permitted the juror communications even to occur, much less relied on them to impeach the verdict. Canon 3(A)(4) expressly

prohibits precisely what happened here. And the court permitted *ex parte* communications on not one but, by its own admission, "several" occasions. The court did not disclose the illicit communications until ten months after trial, thereby denying the parties an opportunity to explore any claims of prejudice. The court then improperly considered the illicit communications in ordering a new trial. In short, the court compounded its error at every turn. **[37]**

E. The Sole Basis For The Court's Ruling Is Thoroughly Belied By The Record The Court Explicitly Acknowledged That Zealous Advocacy Is Not Misconduct.

The validity of the court's reasons for ordering a new trial is eroded by the court's own on-the-record statements The court explicitly acknowledged that the purportedly objectionable behavior was nothing more than zealous advocacy under the circumstances — not prejudicial misconduct. Such vigorous trial advocacy is not grounds for a new trial *Suen v. Greene*, 947 S.W.2d 791, 795 (Ark. 1997) (holding that grant of a new trial based on defense attorney's frequent sidebar comments was a manifest abuse of discretion where record indicated that counsel for both parties were vigorously advocating their clients' interests, court maintained control over the proceedings, and no reasonable possibility of prejudice existed). (A. 82)

The court explicitly acknowledged that arguments between attorneys are commonplace in emotionally-fraught, high-stakes litigation. Indeed, the court went so far as to observe that in its personal experience as both attorney and judge, raised voices occur in *every* such case :

> This is a very, very serious case . . . . Every case I've ever been involved in as an attorney, as a judge, especially when the stakes are this high, we have blowups. We have frustrations. We have emotions. We have outbreaks. It happens because of the emotion. (V. 27, Tr. 234)

The court's statements are fundamentally at odds with its conclusion that such commonplace behavior merits a new trial. The court's ruling is even more indefensible insofar as it singles out Mr. Mannion. The record reflects the court also admonished plaintiff's counsel, and not just Mr. Mannion:
[38]

> *Both* of you are complaining about each other's conduct, and you're *both* doing it. (V. 27, Tr. 209, emphasis supplied)
>
> * * *
>
> I don't appreciate the argument back and forth when both sides are doing what they're complaining the other side is doing. (V. 27, Tr. 234, emphasis supplied)

The conduct to which the court took exception is simply the sort of zealous advocacy often displayed in high-stakes, high-emotion litigation. If contentious attorney exchanges during the heat of trial were sufficient to justify granting a new trial, every verdict would be endangered.

F. The Alleged Objectionable Conduct Did Not Prejudice Plaintiff: The Raised Voices Occurred Outside The Jury's Presence.

Even assuming defense counsel's alleged raised voice at sidebars can be characterized as "misconduct," there is still no basis for awarding a new trial. Under the evidence presented, the jury could have only rendered a verdict for defendants. Thus, plaintiff cannot establish prejudice.

Moreover, counsel's conduct occurred entirely outside the presence of the jury. (V. 24, Tr. 116-22, V. 27, Tr. 208-13) Accordingly, the court exceeded its authority in impeaching the verdict: "[T]he mere presence of error where not shown to be prejudicial cannot be allowed to vest the trial court with the power to substitute its judgment for that of the jury." *Lagoni*, 635 N.E.2d at 634.

Again, the record is clear on this point. The only two conceivable "loud side bar comments" by defense counsel — one after Hagler recanted her previous statements on the stand and the other during Mr. Curcio's unnecessarily hostile treatment of a defense **[39]** witness — occurred *"outside the presence of the jury,"* as reflected in the transcripts. (V. 24, Tr. 117-22; V. 27, Tr. 208-13; emphasis supplied) Simply put, plaintiff could not have been prejudiced by what the jury did not witness or hear.

G. The Court Engaged In Double Speculation In Concluding That Plaintiff Was Prejudiced.

The court's order granting a new trial is fatally flawed for another reason. The court employed double speculation to reach the conclusion that "the comments off the record that the jurors heard were very prejudi-

cial to the Plaintiff." (V. 30, Tr. 24) There is no record evidence the jury overheard anything at all, much less that the jury was thereby prejudiced against plaintiff. Thus, the court's finding is but surmise built on conjecture. Such a shaky foundation cannot sustain the court's order. *Ferman v. Estwing Mfg. Co.*, 31 Ill.App.3d 229, 334, N.E.2d 171, 175 (1st Dist. 1975) ("the granting of a new trial on the basis of mere speculation that a single juror's mannerisms indicated prejudice toward plaintiff constituted a clear abuse of discretion").

H. The Court Did Not Consider Mr. Mannion's Allegedly "Loud Comments" Or Conduct Sufficiently Prejudicial To Take Corrective Action During Trial.

The court's decision to order a new trial is further undermined by its own management of the proceedings. More specifically, by what the court did *not* do. Whatever the court's apprehensions about Mr. Mannion's conduct, they certainly were not sufficient to prompt the court to declare a mistrial and refuse to submit the case to the jury. Certainly, if a court is seriously concerned about misconduct, it has the authority to declare a mistrial. *Ferman*, 334 N.E.2d at 174. The court's failure to do so, or to take any other corrective action, leads to but one conclusion: either no misconduct occurred or the court did not find the alleged misconduct prejudicial. **[40]**

I. Plaintiff Waived Any Challenge To The Claimed "Multiple" Incidents Of Misconduct: Plaintiff Did Not Once Object Or Move For A Mistrial.

There is an additional and independent reason the court erred in granting plaintiffs request for a new trial. The sole basis for the court's grant of a new trial was Mr. Mannion's "off the record comments" purposely made for the jury to hear. (V. 30, Tr. 22-26) While plaintiff's post-trial motion asserts that defense counsel's sidebar objections made in a "loud voice" were clearly audible to the jury, the motion concedes that no objections were made to this alleged behavior, which is admittedly "not reflected" in the record. (R. C4185) Even if that were so, once the court reporter was set up, plaintiff's counsel should have then made a record if he deemed such comments objectionable.

It is axiomatic that the proper procedure to be employed in making a trial record is an objection so the court can conduct a hearing, rule and, if necessary, give a limiting instruction. Failure to do so results in waiver of the claim of error on appeal. *Gillespie v. Chrysler Motors Co.* 135 Ill.2d 363, 553 N.E.2d 291, 297 (1990) (reversing an order grantmg a new trial and holding that the waiver doctrine must be strictly applied).

Plaintiff's failure to contemporaneously object deprived defendants of an opportunity to respond to plaintiff's posttrial assertions of prejudicial error. Defendants were deprived of their right to respond to plaintiff's accusations or to have the jury polled to ascertain whether the jury had heard any alleged "off the record comments."

In short, plaintiff must be deemed to have drawn the same conclusion that the trial court drew during

trial: either defense counsel's conduct was mere advocacy and not prejudicial misconduct, or that an objection would not be made as a matter of trial strategy. Thus, plaintiff cannot now obtain a new trial for conduct deemed acceptable and unobjectionable at the time. *Bauer v. Timucci*, 33 Ill.App.3d 1051, 339 N.E.2d 434, **[41]** 439 (1st Dist. 1975) (holding that it was reversible error to grant a new trial on the basis of alleged misconduct where the complaining party failed to move for a mistrial).

J. A New Trial Awarded On The Basis Of Secret Information Does Not Serve — And, In Fact, Is Contrary To — The Ends Of Justice.

The court ordered a new trial based solely on alleged secret juror communications, as conveyed to the court by the sheriff, concerning jurors' reactions to defense counsel's alleged "off the record" sidebar comments. Simply put, the court's award of a new trial under these circumstances is contrary to every notion of justice recognized under Illinois jurisprudence.

The point was made over 140 years ago by the Illinois Supreme Court, which enunciated the following policy regarding Illinois trials:

> The policy of the law requires, that all the proceedings of the court should be open and notorious, and in the presence of the party, so that if he is not satisfied with it, he may take exceptions to it, in the mode pointed out by the law, and not be put to extraneous proof to show that an error has been committed in a secret proceeding, and, in fact, out of court. *Crabtree v. Hagenbaugh*, 23 Ill. 349, 1860 WL 6249, *1 (1860).

The court's order awarding a new trial is plainly contrary to this policy. The decision to grant a new trial must be based on matters of record, not alleged secret communications to a judge during trial kept hidden from the parties. A new trial awarded on the basis of secret information does not serve — and, in fact, is contrary to — the ends of justice. Thus, the court's order must be reversed and the defense verdict reinstated.

APPENDIX C

No. 07-487

IN THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

U.S. BANK, as Trustee of the ROE ANN LOCKHART OBRA '93 TRUST, and the ROE ANN LOCKHART OBRA '93 TRUST, formerly U.S. Bank as Guardian and Representative of the ESTATE OF ROE ANN LOCKHART, a disabled minor,

Plaintiff-Appellee,

v.

YMCA OF METROPOLITAN CHICAGO, a corporation, TERRELL C. SANDERSON, as a duly authorized agent, servant and employee of the YMCA OF METROPOLITAN CHICAGO, a corporation,

Defendants-Appellants.

PETITION FOR REHEARING

[1]

To The Honorable Justices of the Illinois Appellate Court:

Defendants, the YMCA OF METROPOLITAN CHICAGO, and TERRELL C. SANDERSON, respectfully submit that this Honorable Court overlooked and misapprehended the following points, necessitating further review and relief for defendants:

I.

THIS COURT'S OPINION HOLDING THAT JUDGE BURKE COULD KEEP SECRET THAT THE JURY ALLEGEDLY OVERHEARD SIDEBAR COMMENTS VIOLATES DEFENDANTS' RIGHTS TO DUE PROCESS.

Defendants'[1] rights to due process were violated by Judge Burke's decision and this Court's opinion continues to violate those rights by sanctioning conduct that is the antithesis of due process guaranteed to defendants by both the United States and Illinois Constitutions. U.S. Const. Amend. XIV, § 1 ; Ill. Const. Article I, § 2. The cornerstones of due process are "notice and an opportunity to be heard" — in other words a fair and open hearing. See *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). These due process rights are considered "essential." *Id.* This Court, however, has held it was permissible for Judge Burke to keep secret from defendants information that the trial court allegedly learned concerning something the jury allegedly overheard during trial and not reveal it to defendants until ten months after the verdict was rendered, depriving defendants of any meaningful way

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[1] During the first trial, plaintiff never dismissed Terrell C. Sanderson from the case and the jury verdict in the first trial was rendered not only in favor of YMCA of Metropolitan Chicago but also Terrell C. Sanderson. R.C4135) Terrell C. Sanderson's rights in having the verdict in his favor reinstated are just as great as the YMCA of Metropolitan Chicago and Terrell C. Sanderson has the same due process rights as the YMCA of Metropolitan Chicago and this is the reason Terrell C. Sanderson appears before this Court in this Petition for Rehearing as an appellant.

to challenge the trial judge's decision. [2] This Court has stated at page 14 of its opinion:

> The trial court's findings concerning defense counsel's behavior and remarks during the trial were revealed to the parties six months[2] after the verdict in the first trial, when the court announced its ruling on U S Bank's motion for a new trial It can reasonably be inferred that the trial court may have determined that the issue would be moot if the parties settled the lawsuit through the mediation process it is unfortunate that the trial court did not inform the attorneys when its deputy sheriff informed him of the jurors' comments. However, that failure does not affect the trial court's decision making process in granting U.S. Bank a new trial (slip op. p.14)

This decision cannot stand under the scrutiny of the due process rights guaranteed defendants by both federal and state constitutions and decisional law. Indeed, this Court's decision cannot stand scrutiny under the decisional authorities defendants cited to this Court — which, significantly, this Court never addresses in its opinion These decisions — *People v. Rivers* 410 Ill. 410 (1951); *Takecare v. Loeser*, 113 Ill.

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[2] The verdict in the first trial for defendants was rendered on May 5, 2004(R.C4135-36). On September 7, 2004, the trial court heard oral argument on plaintiff's post-trial motion. (V29, R.C239) It was not until February 25, 2005 — ten months after the verdict for defendants — that the trial court first revealed what it had kept secret from defendants, that the court's bailiff allegedly told the court that the jurors allegedly overheard sidebar comments and were allegedly in disbelief. (V. 30, R.C22)

App. 2d 149 (1969); and *Loucks v. Pierce*, 341 Ill. App. 253 (1950) — require that this Court vacate Judge Burke's decision and reinstate defendants' verdict because Judge Burke's decision violates the federal and state guarantees of due process. This is what the Supreme Court in *Rivers* stated: "The defendants' constitutional right to have everything considered against them produced in open court has been violated." (410 Ill. at 419) In *Loucks*, this is what the court said about a trial court, such as Judge Burke here, keeping information from litigants:

> Possibly the trial judge received information from his own officers whom he believed to be unprejudiced and reliable. If so, it would be proper to conduct an investigation, but that should be done in [3] open court upon notice to counsel of record. The information obtained should be preserved, either in the form of affidavits or better still by direct testimony duly reported. The rules of evidence should be applied and only persons having actual knowledge of the facts should be heard. (341 Ill. App. at 257)

These decisional authorities, such as *Rivers* and *Loucks*, hold that a record was mandated — and that record should have been made in this case at the time Judge Burke's bailiff allegedly told Judge Burke that the jurors allegedly overheard sidebar comments. Judge Burke never brought this out into the open; nor did His Honor ever go on the record during the trial to say he thought jurors heard sidebar comments. Thus, there is no record during this trial supporting any of Judge Burke's later findings of "repeated" conduct. This kind of decision-making process which this

Appellate Court approves is simply not supported by the openness required by notions of due process. Essentially, defendants were charged, tried and convicted all in one proceeding by Judge Burke, without any opportunity to have any meaningful way of challenging Judge Burke's accusations of attorney misconduct during trial, which were based upon information Judge Burke was keeping to himself all this time.

This kind of decision-making process, which this Appellate Court has upheld, effectively deprives litigants such as defendants of an opportunity to be heard in a meaningful way. The witnesses to any alleged sidebar outbursts were the jurors. The time to have called them to testify was during the trial, when Judge Burke supposedly became possessed of information that the jury allegedly overheard sidebar comments. Even if this was just the judge's own perception, due process required His Honor to make that known to defendants so that the jurors could be interviewed in open court and asked the following:

— Did the jurors actually hear anything?

— If they heard something, what exactly did they hear?

— If they heard any comments, who did they hear making the comments? **[4]**

— And if they heard any comments could they still fairly evaluate the case or had they developed any prejudices or biases after allegedly hearing these comments?

Such an examination of the jurors would have afforded the litigants the openness and fairness due process requires. Keeping this information a secret until ten months after a verdict is issued and a jury is discharged and then using personal recollection to impeach a verdict, effectively foreclosing defendants

from examining the jurors about these issues, is contrary to the notions of fundamental fairness and openness inherent in the due process clauses of the United States and Illinois Constitutions.

One further point.

This Court's statement at page 14 of its opinion, that the trial court may have sat on this information and hoped for a settlement that would moot out the issue, likens the trial court to a clandestine advocate for the plaintiff. Is this why the trial court kept secret this information from defendants — that it became the clandestine advocate for the plaintiff, gambling for a plaintiff's verdict? Is this why the trial court forced mediation following a defense verdict — trying to coerce defendants into paying plaintiff money? The role of a trial judge in our system of jurisprudence should be impartial to either side and
not an advocate for the plaintiff against defendants.

Defendants ask this Court on rehearing to look at the facts of this case through the prism of due process; to look at this case and apply the decisional authorities which defendants cited to this Court, which remain unaddressed. There should be no opinion on our law books approving the decision-making that led to the new trial in this cause.

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